SUPREME COURT OF ARKANSAS

IN RE: RULES OF CIVIL PROCEDURE 5, 11 and 58; ADMINISTRATIVE ORDERS 19 and 19.1; RULES OF APPELLATE PROCEDURE—CIVIL 6 and 11; RULES OF THE SUPREME COURT and COURT OF APPEALS 1-2, 2-1, 2-3, 2-4, 3-1 and 4-1

Opinion Delivered October 23, 2008

PER CURIAM

In February 2007, we adopted Administrative Order 19, which governs the public's access to court records. In our *per curiam* we asked our Committee on Civil Practice to study this comprehensive new Administrative Order and recommend any needed changes in our court rules for civil cases. On June 5, 2008, we published for comment the Committee's proposals for changes in the Arkansas Rules of Civil Procedure, Administrative Orders, Rules of Appellate Procedure—Civil, and Rules of The Supreme Court and Court of Appeals. We thank everyone who reviewed the proposals and made comments.

We accept the Committee's recommendations with several changes prompted by the comments. We adopt the following amendments to be effective January 1, 2009 and republish the Rules and Reporter's Notes as set out below.

Any document filed before the effective date of these rule changes does not have to comply with the redaction requirements. We impose no obligation to redact existing court records. This would be an almost impossible burden for litigants, lawyers, and circuit clerks.

Appeal records filed after January 1, 2009 will necessarily contain documents filed with the circuit courts that do not comply with the redaction rules. This is acceptable. The revised appellate rules require that appellate briefs, petitions, and motions—including abstracts and addendums—filed starting January 1, 2009, comply with the new requirements. Any needed redactions will therefore occur when counsel or a pro se litigant prepares these papers. Over time, appellate records will gradually come into compliance as they reflect papers filed in circuit court after the effective date of these new rules.

We call attention to the following amendments, which were not part of the Committee's proposals but arose out of comments from the bench and bar. First, we have modified one aspect of Administrative Order 19. The addresses and phone numbers of all litigants are no longer deemed confidential. Instead, only the addresses of petitioners requesting anonymity in domestic-abuse matters are confidential. This change makes Administrative Order 19 track existing substantive law. Second, Rule of Supreme Court and Court of Appeals 3-1 has been amended to clarify how confidential material under seal should be listed in the table of contents and paginated in an appeal record. Third, Rule of Appellate Procedure—Civil 6 has been amended by adding a new subdivision governing access to any sealed portion of an appellate record. Because many appeal records will soon contain at least some confidential material under seal, a rule about access was needed.

These rule changes are comprehensive and significant. Starting on January 1, 2009, litigants and their lawyers must, in so far as possible, first eliminate all confidential information from all court filings. If the information is essential to the case, then litigants and their lawyers

must redact it in the publicly available copy of the filed document and file a duplicate, unredacted copy under seal for use by the parties and the court. These new procedures will start implementing Administrative Order 19's careful balance between the public's right to access their courts' records with litigants' rights to keep confidential information private. We expect that refinements will be needed. We therefore encourage the bench and bar to suggest further rule changes based on their experience with these procedures in practice in 2009.

We encourage all judges and lawyers to review this *per curiam* in order to familiarize themselves with the changes to the rules. We again express our gratitude to the members of our Civil Practice Committee for the Committee's diligence in performing the important task of keeping our civil rules current, efficient, and fair.

A. ARKANSAS RULES OF CIVIL PROCEDURE

Rule 5 has been amended to add a new subdivision (c)(2) and former subdivision (2) is renumbered (3).

(c) *Filing*. (1) All papers after the complaint required to be served upon a party or his attorney shall be filed with the clerk of the court either before service or within a reasonable time thereafter. The clerk shall note the date and time of filing thereon. However, proposed findings of fact, proposed conclusions of law, trial briefs, proposed jury instructions, and responses thereto may but need not be filed unless ordered by the court. Depositions, interrogatories, requests for production or inspection, and answers and responses thereto shall not be filed unless ordered by the court. When such discovery documents are relevant to a motion, they or the relevant portions thereof shall be submitted with the motion and attached as an exhibit unless such documents have already been filed. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form. In counties where the county clerk serves as the ex officio clerk of any division of the circuit court, the filing requirement for any pleading, paper, order, judgment, decree, or notice of appeal shall be satisfied when the document is filed with either the circuit clerk or the county clerk.

(2) Confidential information as defined and described in Sections III(A)(11) and

VII(A) of Administrative Order 19 shall not be included as part of a case record unless the confidential information is necessary and relevant to the case. Section III(A)(2) of the Administrative Order defines a case record as any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a judicial proceeding. If including confidential information in a case record is necessary and relevant to the case:

(A) The confidential information shall be redacted from the case record to which public access is granted pursuant to Section IV(A) of Administrative Order 19. The point in the case record at which the redaction is made shall be indicated by striking through the redacted material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order]. If an entire document is redacted, then the name of the document (with the number of pages redacted specified) should be noted in the publicly available court file and the entire document should be filed under seal. The requirement that the redaction be indicated in case records shall not apply to court records rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record; and

(B) An un-redacted copy of the case record with the confidential information included shall be filed with the court under seal. The un-redacted copy of the case record shall be retained by the court as part of the court record of the case. It is the responsibility of the attorney for a party represented by counsel and the responsibility of a party unrepresented by counsel to ensure that confidential information is omitted or redacted from all case records that they submit to a court. It is the responsibility of the court, court agency, or clerk of court to ensure that confidential information is omitted or redacted from all case records, including orders, judgments, and decrees, that they create.

(3) If the clerk's office has a facsimile machine, the clerk shall accept facsimile transmissions of any paper filed under this rule and may charge a fee of $1.00 per page. Any signature appearing on a facsimile copy shall be presumed authentic until proven otherwise. The clerk shall stamp or otherwise mark a facsimile copy as filed on the date and time that it is received on the clerk's facsimile machine during the regular hours of the clerk's office or, if received outside those hours, at the time the office opens on the next business day.

The Reporter's Notes accompanying Rule 5 are amended by adding:

Addition to Reporter's Notes, 2008 Amendment: Subdivision (c) of the rule has been amended to incorporate Administrative Order 19's requirements, which grant the public broad access to case records while safeguarding confidential information in those records. (The Administrative Order is appended to the Rules of Civil Procedure.) Amended Rule 5(c) obligates lawyers, and pro se litigants, to identify and shield confidential information that is necessary and relevant to the case by redacting that information in all publicly available

documents they file with the court. The rule places primary responsibility for protecting information that the law has adjudged confidential on those individuals best situated to recognize and protect that information—lawyers and parties. They know the facts of their cases better than court staff or courts; they create almost all the documents coming into the court's record; and they have the greatest incentive to minimize and protect confidential information in case records.

Under subdivision 2(B), courts, court agencies, and clerks are responsible for omitting or redacting confidential information from case records—including orders, judgments, and decrees—that they create. A parallel change reflecting this obligation in judgments and decrees has been made in Rule of Civil Procedure 58.

Administrative Order 19 defines categories of confidential information and the Commentary to the Order explains the legal basis for the confidentiality. Section VII of the Order lists the following categories of confidential information in case records that are excluded from public access absent a court order allowing disclosure:

(1) information excluded from public access pursuant to federal law;
(2) information excluded from public access pursuant to the Arkansas Code Annotated;
(3) information excluded from public access by order (including protective order) or rule of court;
(4) Social Security numbers;
(5) account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);
(6) information about cases expunged or sealed pursuant to Ark. Code Ann. § 16-90-901, et seq.;
(7) notes, communications, and deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies; and
(8) all home and business addresses of petitioners who request anonymity when seeking a domestic order of protection.

The Commentary to Section VII of Administrative Order 19 discusses confidential information protected from public disclosure under federal and Arkansas law. The Commentary includes a non-exhaustive list of Arkansas Code Annotated sections regarding confidentiality of records whose confidentiality may extend to the records even if they become court records. See also the Arkansas Personal Information Protection Act, Ark. Code Ann. § 4-110-101, et seq.

New subsection (c)(2) embodies Order 19's important threshold requirement: only confidential information that is "necessary and relevant to the case" should be in a case record. Litigants are likewise best able to make this evaluation. And because they must redact

any such information in a case record, litigants will have an incentive to reduce redactions by screening out unnecessary and irrelevant confidential information when creating documents for filing.

The amended rule provides two methods of redaction: blacking out the protected information or inserting a bracketed reference to the fact of redaction. Both achieve Administrative Order 19's balance between public access and confidentiality. If a redaction covers all of any multi-page document, then the rule requires listing the name of the document and the number of pages redacted in the publicly available court file. No useful purpose would be served by having a stack of blacked-out pages in the public file.

Because a litigant will have deemed redacted information necessary and relevant, the court will need access to that information in handling and deciding the case. To allow this access, subdivision 2(B) obligates litigants to file unredacted copies of all their court papers under seal.

Some state agencies who deal routinely with confidential information—such as the Public Service Commission—have developed specialized rules for handling and protecting that information. Administrative Order 19 and its implementing rules in the Rules of Civil Procedure do not apply directly to those agencies' internal proceedings. But when a case from the PSC or other agency is appealed, the Rules of Appellate Procedure—Civil and the Rules of the Supreme Court and Court of Appeals do apply. Those Rules now implement Administrative Order 19 by incorporating and applying the redaction provisions of the Rules of Civil Procedure to all briefs, petitions, and other papers filed on appeal. Current agency procedures about confidential information that do not conflict with the new redaction rules are permissible. For example, confidential PSC documents are filed at the Commission on pink paper under seal. This and similar procedures supplement, but do not conflict with, the basic scheme required by Rule of Civil Procedure 5(c)(2). Certain appeal records will therefore contain materials shaped by these supplementary procedures, which is acceptable.

Former subsection (c)(2) has been renumbered, and is now (c)(3).

Subdivision (a) of Rule 11 is amended to read:

(a) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and

belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and that it complies with the requirements of Rule of Civil Procedure 5(c)(2) regarding redaction of confidential information from case records submitted to the court. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The Reporter's Notes accompanying Rule 11 are amended by adding:

Addition to Reporter's Notes, 2008 Amendment: Subdivision (a) has been amended by adding a new element to the certifications made by a pro se party or an attorney when that person signs a pleading, motion, or other paper. The attorney or party is now also certifying compliance with Administrative Order 19's mandate for redaction of necessary and relevant confidential information in the case record being filed. The incorporation of Administrative Order 19's mandate here gives the circuit court a ready method for enforcing this mandate.

Rule 58 has been amended to read:

Subject to the provisions of Rule 54(b), upon a general or special verdict, or upon a decision by the court granting or denying the relief sought, the court may direct the prevailing party to promptly prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court. The court may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel. A judgment or decree shall omit or redact confidential information as provided in Rule 5(c)(2).

Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Administrative Order No. 2. Entry of judgment or decree shall not be delayed for the taxing of costs.

The Reporter's Notes accompanying Rule 58 are amended by adding:

Addition to Reporter's Note, 2008 Amendment: The rule has been amended to reflect Administrative Order 19's requirement that any necessary and relevant confidential information in a case record—a category that includes judgments and decrees—must be redacted. See Addition to Reporter's Notes, 2008 Amendment to Rule of Civil Procedure 5.

B. ADMINISTRATIVE ORDERS OF THE SUPREME COURT

We amend **Administrative Order Number 19, Section VII(A)(8)** to read:

(8) all home and business addresses of petitioners who request anonymity when seeking a domestic order of protection.

Explanatory Note: Before the amendment, this part of the Administrative Order made the address and phone number of all litigants confidential. That rule would have been both too broad and unworkable. Litigants' addresses are needed for, among other things, summonses and judgments. The revised provision is limited to the situation where current substantive law makes a litigant's addresses confidential for an obvious and compelling reason. Ark. Code Ann. § 9-15-203 (Repl. 2008).

We issue the following new Administrative Order:

ADMINISTRATIVE ORDER NUMBER 19.1 — REDACTION IN COURT ADMINISTRATION RECORDS

Confidential information as defined and described in Sections III(A)(11) and VII(B) of Administrative Order 19 shall not be included as part of a court administrative record unless the confidential information is necessary to the administration of the judicial branch of government. Section III(A)(3) of the Order defines an administrative record as any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government. If inclusion of confidential information in a court administrative record is necessary to the administration of the judicial branch of government:

A. The confidential information shall be redacted from the court administrative record to which public access is granted pursuant to Section IV(A) of Administrative Order 19. The point in the court administrative record at which the redaction is made shall be indicated by striking through the redacted material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order]. The requirement that the redaction be indicated in a court administrative record shall not apply to administrative records rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record; and

B. An un-redacted copy of the court administrative record with the confidential information included shall be filed with the court under seal. It is the responsibility of a court, court agency, or clerk of court creating a court administrative record to ensure that confidential information is omitted or redacted from administrative records. As noted in Section XI of Administrative Order 19, a court may use its inherent contempt powers to enforce this rule.

Explanatory Note: This new Administrative Order applies only to records

related to court administration created by the judicial branch and agents and agencies of that branch. It does not apply to records created by administrative agencies in the Executive Branch or independent administrative agencies.

C. ARKANSAS RULES OF APPELLATE PROCEDURE—CIVIL

Subdivision (f) is added to Rule 6:

(f) *Access to parts of record under seal.* When the record contains materials under seal, all counsel of record and pro se litigants shall have access to all parts of the record including the material under seal. For good cause shown on the motion of any party, the appellate court may modify the terms of access.

Explanatory Note: The new redaction requirements for confidential information will create some materials under seal in many cases. This new subdivision makes clear that counsel and unrepresented litigants need not file a motion for access to such materials in every case; access by counsel and pro se litigants is presumptively allowed. This arrangement may be modified on motion for good cause.

Subdivision (a) of Rule 11 is amended to read:

(a) The filing of a brief, motion or other paper in the Supreme Court or the Court of Appeals constitutes a certification of the party or attorney that, to the best of his knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact; is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; is not filed for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and that the document complies with the requirements of Rule of Civil Procedure 5(c)(2) regarding redaction of confidential information. A party or an attorney who files a paper in violation of this rule, or party on whose behalf the paper is filed, is subject to a sanction in accordance with this rule.

The Reporter's Notes accompanying Rule 11 are amended by adding:

Addition to Reporter's Notes, 2008 Amendment: Subdivision (a) has been amended by adding a new element to the certifications made by a party or an attorney when that person signs a brief, motion, or other paper, including a petition for rehearing or review. The change parallels the 2008 amendment to Rule of Civil Procedure 11. When counsel or a pro se litigant signs a brief, motion, petition, or other paper filed with the appellate court, the person is also certifying compliance with Administrative Order 19's mandate for redaction of necessary and relevant confidential information in the paper being filed. The redaction/filing-under-seal procedure for confidential information is outlined in Rule of Civil Procedure 5(c)(2)(A) & (B) and explained in the Addition to Reporter's Notes, 2008

Amendment to that Rule.

D. RULES OF THE SUPREME COURT AND COURT OF APPEALS

The Informational Statement, which is described in subdivision (c) of Rule 1-2 and is appended to the Rule, is amended to read:

INFORMATIONAL STATEMENT

* * *

VI. CONFIDENTIAL INFORMATION

(1) Does this appeal involve confidential information as defined by Sections III(A)(11) and VII(A) of Administrative Order 19?
___ Yes ___ No
(2) If the answer is "yes," then does this brief comply with Rule 4-1(d)?
___ Yes ___ No

Rule 2-1 is amended to add subdivision (f):

(f) *Compliance with Administrative Order 19 required.* Every motion, response, similar paper, memorandum of authorities, and any document attached to any of those papers, must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

Rule 2-3 is amended to add subdivision (l):

(l) *Compliance with Administrative Order 19 required.* Every petition for rehearing, brief in support, and brief in response must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

Rule 2-4 is amended to add subdivision (g):

(g) *Compliance with Administrative Order 19 required.* Every petition for review, response, and supplemental brief of any kind on review must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel

and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

Rule 3–1(f) is amended to read:

(f) *Table of contents*. Every record shall include a table of contents which refers to the pages in the record where the matter identified is copied. For example:

The record shall be consecutively paginated, including any papers under seal. The table of contents shall also list all documents filed under seal.

Explanatory Note: The rule has been amended to illustrate how to handle and compile material under seal because it has been redacted. Records have long been consecutively paginated, and that practice is now reflected in the amended rule. Material under seal should be reflected in the table of contents. If a pleading, motion, brief, or other paper contains some internal redactions, that fact should be noted in the table of contents. The complete version of the paper under seal should contain the same appeal-record page

numbers as the redacted version in the publicly available file. If a document has been redacted completely, then the public file should contain the name of the document and a list of the pages redacted. For multi-page redactions, the unredacted copy under seal should contain page numbering that fills the gap left in the public court record, as shown in the example above for motion exhibit A.

Rule 4-1 has been amended to add a new subdivision (d) and former subdivision (d) is redesignated (e):

(d) *Compliance with Administrative Order 19 required.* All parts of all briefs, including the abstract and any document attached to any brief in the addendum, must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

(*e*) *Non-compliance.* Briefs not in compliance with this Rule shall not be accepted by the Clerk.

GUNTER and DANIELSON, JJ., concur.

DANIELSON, J., concurring. Let me begin by commending the Committee for its work in this area. I concur with the changes being made to these rules and write merely to provide some words of caution that I feel are necessary. The public's access to court records is of the utmost importance. Indeed, this court and the courts of this state clearly strive to make our court records as accessible to the public as possible. However, I believe there is an important distinction to be made between accessibility and publication, as pointed out and discussed by Professor Ned Snow in his recent article. *See* Ned Snow, *Arkansas Court Documents Going Online: Bad Policy for Private Information*, 2008 Ark. L. Notes 113.

Our rules have provided that certain information, when available in electronic form, shall be made remotely accessible to the public,[1] unless public access is restricted

[1]"Remote access" is defined as "the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained." Admin. Order of the Sup. Ct. 19, § III(7).

pursuant to our rules. *See* Admin. Order of the Sup. Ct. 19, § V (2008). This includes: (1) litigant/party/attorney indexes to cases filed with the court; (2) listings of case filings, including the names of the parties; (3) the register of actions or docket sheets; (4) calendars or dockets of court proceedings, including case numbers and captions, date and time of hearings, and location of hearings; and (5) judgments, orders, or decrees. *See id*. Nothing, as it stands now, prohibits pleadings or other documents that might be filed in a case from being published electronically. In fact, our order leaves the decision on remote accessibility of information beyond the above list to the discretion of the court.

I would caution the courts of this state to exercise that discretion very carefully. Even with the utmost diligence that will be exercised by litigants and their lawyers, confidential information is sure to be missed in some cases. And while it is true that we must ensure public access to court records, the courts of this state must also make every effort to protect the individual privacy rights and interests of Arkansas's litigants. Were every document in a case published electronically, our courts could very well surpass expectation in making court records available and, instead, engage in the publication of private information. Surely, our litigants' rights to privacy do not fall second to the public's electronic accessibility of court records.

As we move forward in this electronic age, we must take care to protect *all* of our litigants' interests and not just some. I urge the courts of this state to tread carefully when determining what information should be made remotely accessible. For these reasons, I respectfully concur.

GUNTER, J., joins.